JOHN W. BALE
v.
COMMISSIONER OF INDIAN AFFAIRS

IBIA 80-15-A Decided October 15, 1980

Appeal from determination by Acting Deputy Commissioner of Indian Affairs Sidney L. Mills, upholding decision to cancel lease of Indian trust lands for default in payment of rents.

Affirmed.

1. Indian Lands: Leases and Permits: Long-term Business/ Agriculture: Cancellation

Failure to raise question concerning delivery of water to leased lands at early stages of appeal, together with circumstances surrounding the issue sought to be raised which indicate the question was not seriously urged by appellant in dealings with the tribal lessor, require a finding that alleged failure to supply water to the leased lands in a certain fashion was not a default by the lessor that would excuse payment of rent.

2. Indian Lands: Leases and Permits: Long-term Business/ Agriculture: Cancellation

Where lease contains several provisions concerning notice to be given in case of default, the provisions of Departmental regulation incorporated into the lease which govern due process requirements for giving notice of default are controlling. Since appellant received the benefit of the notice provisions of both 25 CFR 131.14 and the default clause at paragraph 27 of the lease, he was not damaged by an omission of some of the language of paragraph 27 from the notice of default sent him by the tribe.

APPEARANCES: J. Francis Spelman, Esq., for appellant; Bruce M. Landon, Esq., Office of the Solicitor of the Department of the Interior for appellee.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On October 3, 1972, appellant entered into a lease with the Chemehuevi Tribe (tribe), with Departmental approval, of approximately 6 acres of trust land near Lake Havasu in San Bernardino County, California. The lease provides that the land is to be used for a trailer park. Under the lease, a base rental of $1,600 is to be paid annually, which is to be supplemented by a payment equal to 20 percent of gross receipts established by an accountant's statement certifying the gross annual income of the park. The lease provides that water for the operation of the park shall be provided by the tribe up to a quantity of 5.5-acre feet annually.

Payments by appellant, except for the initial payment, were not made on the agreed dates. Appellant also failed to provide a certified account of his gross receipts from the trailer park operation, although percentage payments based upon a stated account of gross receipts were made from time to time. Bureau of Indian Affairs (BIA) records show the lease account rentals to have been paid in the following manner:

Flat Rate Payments

Date	Amount Paid
10/3/72	$1,637.00
10/17/73	1,600.00
11/5/74	1,600.00
12/4/74	1,600.00
12/29/75	1,600.00
1/26/76 (interest)	42.14
10/28/76	1,600.00
11/4/77	1,600.00
10/13/78	1,600.00

Percentage of Gross Receipts Payments

Date	Amount Paid
11/28/75	$ 283
11/4/77	242
9/22/78	1,928
10/23/78	440

On January 15, 1978, the tribe allegedly discontinued delivery of water to the park; at any rate, negotiations concerning an alternative source for the supply of water were proposed, coincident to a possible transfer of the lease. On February 28, 1978, the tribal council administrator sent appellant a written memorandum concerning the lease administration as follows:

> The Chemehuevi Tribal Council voted Saturday, February 25th, not to permit the transfer or sale of your lease at this time.
>
> Please submit certified statements of the Gross Receipts to this office. As you know, Paragraph 8 of your lease requires that "The Lessee shall, not later than thirty (30) days after each successive anniversary of the beginning date of the term of this lease, which shall be the end of the fiscal year of this lease, submit to the Lessor and the Secretary, certified statements of the Gross Receipts for the immediately proceeding [sic] fiscal year of the lease." The anniversary of the lease is October 3rd and we have not received the required certified statements.
>
> How is the lease presently being supplied with water?
>
> Please be advised that "Should the Lessee attempt to make any such sublease, assignment or transfer . . ." (without written approval from the Tribe), "such action shall be deemed a breach of this lease."
>
> I am looking forward to hearing from you.

On March 2, 1978, appellant responded to the tribal correspondence, stating in substance, that an accounting as required by the lease was in preparation and would be ready by the "next council meeting." The reply also proposed several alternative water supply schemes for the park and obliquely referred to a statement by a tribal employee in which "your former employee informed me you had the water cut off lease #B 431-CR." Disavowing an intention to transfer the lease without tribal consent, appellant promised a full accounting of "all gross receipts." No mention was made of withholding any payment to insure a solution of water supply problems on the leased lands.

On September 5, 1978, a 10-day cure notice of default pursuant to 25 CFR 131.14 was sent by BIA on behalf of the tribe to appellant directing him to show cause why his lease should not be canceled for failure to account for and pay the percentage rental fees due under the lease. Appellant responded to the notice with payment of $1,928 together with an account in writing from a certified public accountant

concluding that the amount paid was, in fact, owed although the accountant was unable to verify the correctness of the receipts shown which established the statement of account. No interest was paid on the late payment despite the provisions of the lease which required payment of 12 percent interest on late rental payments.

On September 28, 1978, the lease was ordered canceled by the BIA superintendent concerned, who found that appellant had failed to show cause why the lease should not be canceled since the account was not certified to be a correct account based upon accepted accounting standards and because no offer to furnish a certified accounting was made within the 10-day cure period. On November 3, 1978, appellant furnished a certified accounting of gross receipts showing $962 additional rental to be due based upon a verified accounting of trailer park receipts. Payment of $962 was furnished with the amended statement of account, although again no interest was paid.

Appellant sought relief from the area director, who on May 10, 1979, affirmed the superintendent's decision to cancel the lease. Appeal to the Commissioner of Indian Affairs followed. On October 23, 1979, Acting Deputy Commissioner Mills affirmed the previous agency decisions, noting that the claimed deprivation of a water supply to the park had not, until the matter reached the commissioner, been made an issue so far as cancellation of the lease was concerned.

On appeal to this Board contention is made by appellant that the cancellation notice to him failed to comply with the provisions of 25 CFR 131.14, incorporated into the lease by reference, and with provisions of paragraph 27 of the lease dated October 3, 1972. He also contends that he is now in full compliance with the terms of the lease respecting payment and that compliance was achieved before proper notice of violation was given to him. Finally, he argues that the tribe was in default of the lease by failing to provide water as agreed, and that he was entitled to withhold payment to compel the tribe to comply with the lease provisions regarding water supply to the park.

[1] The recorded exchange between the tribe and appellant contradicts the contention that payment was delayed to encourage continued delivery of water by the tribe. Appellant's reply of March 2 expresses a willingness to use an alternative source of supply for water, and seeks an easement or other suitable arrangements to facilitate several possible methods of water delivery. The record as a whole demonstrates that this issue concerning the park's water supply is without merit, being merely an afterthought rather than a real point of contention between the parties to the lease.

[2] The arguments raised concerning the notice requirements of the lease are more substantial. Paragraph 27 of the lease agreement of October 3, 1972, recites in pertinent part:

> Time is declared to be of the essence of this lease. Should Lessee default in any payment of monies or fail to post bond, as required by the terms of this lease, and if such default shall continue uncured for the period of thirty (30) days after written notice thereof by the Lessor or the Secretary to Lessee, during which 30-days period Lessee shall have the privilege of curing such default, or should Lessee breach any other covenant or provision of this lease, and if such breach shall continue uncured for a period of sixty (60) days after written notice thereof by the Lessor or the Secretary to Lessee, during which 60-days period Lessee shall have the privilege of curing such breach, [then Lessor and the Secretary may take a number of actions one of which is to cancel the lease].

While 25 CFR 131.14 provides that:

> Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. The surety or sureties shall be sent a copy of each such notice. If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach. If the lessee fails within such reasonable time to correct the breach or to furnish satisfactory reasons why the lease should not be cancelled, the lessee shall forthwith be notified in writing of the cancellation of the lease and demands shall be made for payment of all obligations and for possession of the premises. The notice of cancellation shall inform the lessee of his right to appeal pursuant to Part 2 of this chapter.

The regulation requirements are not inconsistent with the default provisions of paragraph 27. As applied to this transaction, both the lease provision and Departmental rule requirements were followed in the notices given to appellant. The February 28 notice to appellant gave him notice that he needed to supply the tribe a certified accounting of his gross rental receipts. (Appellant conceded that this was so in his March 2 reply acknowledging the obligation and promising performance "by next council meeting.") That the tribe extended more time to permit the defect in performance to be cured than was required by the lease was not a waiver of the defect under the circumstances described, where the appellant promised to perform while seeking additional time to comply. It does not appear how

failure to include the exact language of the lease provision in the written notice could in any way have injured appellant. The forbearance of the tribe in this regard cannot now be used to nullify a notice which was otherwise sufficient. Small v. Commissioner of Indian Affairs, 8 IBIA 18 (1980).

Turning to the 10-day cure notice of September 5, 1978, sent pursuant to 25 CFR 131.14 appellant argues that the existence of a specific default provision in the lease at paragraph 27 "abrogated" the application of the Departmental regulation published at 25 CFR 131.14. Thus, the thrust of his argument is that both the tribal notice and the BIA notice were defective and that he has not yet received a proper notice of default. Appellant contends all defaults in his performance were cured by November 3, 1978. This argument is erroneous as a matter of law. The agency may not act contrary to its own published regulations. Those regulations are binding upon the Department and must be given effect in cases where they are of direct application. Kuykendall v. Phoenix Area Director, Bureau of Indian Affairs, and Yavapai-Prescott Tribe, 8 IBIA 76, 87 I.D. 189 (1980) (appealed to United States District Court for Arizona sub nom. Yavapai-Prescott Indian Tribe v. Andrus, Civ. No. 80-464, filed June 17, 1980). The regulation requirements concerning notice of default in performance were followed precisely by the agency.

The record affirmatively shows appellant received the full benefit of the 60-day grace period allowed by paragraph 27 of the lease within which to pay his rent. Following this notice, which was given by the tribal lessor, he also received the benefit of the 10-day cure period afforded by the notice given by the agency pursuant to 25 CFR 131.14. His belated offers to cure the admitted defaults in payment were insufficient, under the circumstances, to cure the defaults in performance in timely fashion. Termination for failure to make percentage payments, provide a certified statement of account, and pay interest on late payments was correctly directed by the agency.

The Commissioner's decision to uphold the order of cancellation of the lease is affirmed.

This decision is final for the Department.

Franklin Arness
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge